In The
SECOND CIRCUIT COURT OF
DAVIDSON COUNTY, TENNESSEE

FRANCES D. KROHN

vs.

RICHARDSON-MERRELL, INC.,
The WM. S. MERRELL COMPANY
DIVISION

NO. 72167

MINUTE
BOOK 96

PAGE 114

ORDER

This cause was heard on Motion of defendant to dispose of its Demurrer to the Declaration in this cause consisting of the First Amended Declaration and of Supplement To The First Amended Declaration, when, having heard the argument of counsel and upon due consideration the Court is of opinion and finds that a wife has no such cause of action in Tennessee and the Demurrer should be sustained.

It is therefore ORDERED AND ADJUDGED that the Demurrer of the defendant is sustained, and that plaintiff's suit be and is hereby dismissed at the cost of plaintiff for which let execution issue. To this action of the Court the plaintiff excepts and prays an Appeal in the nature of a Writ of Error to the Supreme Court sitting at Nashville, which Motion is granted, conditioned upon plaintiff making bond or taking the pauper's oath within thirty (30) days.

/s/ John L. Uhlian
JUDGE

APPROVED FOR ENTRY:

WATKINS, McGUGIN & STEWART

BY /s/ Dan E. McGugin
Attorneys for Plaintiff

/s/ John K. Maddin, Jr.
Attorneys for Defendant

* * *

TENNESSEE SUPREME COURT OPINION

[406 S.W. 2d 166]

[166] FRANCES D. KROHN, Appellant,

v.

RICHARDSON-MERRELL, INC., the WILLIAM S. MERRELL COMPANY DIVISION, Appellee.

Supreme Court of Tennessee.

July 18, 1966.

Rehearing Denied Sept. 23, 1966.

Action against drug company for loss of husband's consortium. The Circuit Court, Davidson County, John L. Ulian, J., rendered judgment for drug company and wife appealed. The Supreme Court, Creson, J., held that wife's allegations that drug company which allowed dangerous drug to remain on market, and continued to advertise and solicit its use, intentionally rendered husband impotent did not state cause of action for loss of consortium as intentional injury was directed, not at

wife or marital relationship, but at husband who consumed drug and failure to allow wife recovery, although same is allowed husband, is not discrimination based on sex but was no more than practical and logical classification.

Judgment affirmed.

1. Husband and Wife 209(4)

Wife cannot recover for loss of consortium by reason of injury to her husband regardless of whether injury was negligently or intentionally inflicted.

2. Husband and Wife 229(2)

Wife's allegations that drug company, which allowed dangerous drug to remain on market, and continued to advertise and solicit its use, intentionally rendered husband impotent did not state cause of action for loss of consortium as intentional injury was directed, not at wife or marital relationship, but at husband who consumed drug.

3. Courts 90(1)

Court would not overrule its previous decisions and allow wife to recover for loss of consortium as only Legislature should allow such recovery.

4. Constitutional Law 249

Refusal to allow wife recovery for loss of consortium, although husband is allowed recovery for injury does not deny equal protection. U.S.C.A. Const. Amend. 14.

Dan E. McGugin, Nashville, for appellant.

John K. Maddin, Jr., Nashville, Gracey, Buck, Maddin & Cowan, Nashville, of counsel, for appellee.

OPINION

CRESON, Justice.

This appeal comes from the Circuit Court of Davidson County, Tennessee. The parties will be referred to herein as they appeared in the trial court; that is, appellant Frances D. Krohn as plaintiff, and appellee Richardson-Merrell, Inc., The William S. Merrell Company Division as defendant.

On June 17, 1965, plaintiff filed her declaration seeking to recover $250,000.00 in damages for loss sustained by her as a result of her husband, Howard E. Krohn,

[167] having taken a drug described as Triparanol, commonly referred to under the trade name of MER/29, the same having allegedly rendered him impotent. The declaration, as amended, contains six counts, but it is unnecessary to detail the contentions made in each of these counts as the question presented by the declaration as a whole is simply—may a wife recover for loss of consortium where the injuries resulting in the impotency of her husband were intentionally inflicted by the defendant. The declaration, as amended, charges that the defendant in this case, by allowing the drug in question to remain on the market, and by continuing to advertise and solicit its use, after knowing that the drug produced harmful side effects of the nature involved here, did intentionally inflict upon the plaintiff's husband the injuries sustained by him and resulting in the loss to the plaintiff for which recovery is sought in

this lawsuit.

On September 24, 1965, the defendant filed a demurrer to plaintiff's declaration, which reads as follows:

> "Comes now the defendant, through its attorneys, and demurs to the declaration heretofore filed in this cause upon the ground that there is no warrant in law for the maintenance of such action as the plaintiff seeks, because she could not maintain such a suit at common law and there is no statute in Tennessee permitting its maintenance."

On November 4, 1965, the trial court entered an order sustaining the defendant's demurrer upon the basis that "a wife has no such cause of action in Tennessee."

Appeal has been timely perfected to this Court from the action of the trial court in sustaining the defendant's demurrer.

The assignments of error filed in this Court are as follows:

> "1. The Trial Court erred in sustaining the demurrer to the Declaration. Tr. p. 31.
>
> "2. The Trial Court erred in finding and ruling that there is no such cause of action in Tennessee *under these particular facts* and as result in dismissing Appellant's suit. Tr. p. 31."

In support of these assignments of error, the plaintiff, after admitting that it is presently the established law in Tennessee that a wife may not recover for loss of consortium where the injury inflicted upon the husband is the result of negligence of the defendant, urges (1) that this case must be differentiated since it is alleged in

the declaration, and must be accepted as fact here, that the injury inflicted upon the husband, resulting in the loss to the wife for which compensation is sought here, was intentionally inflicted; and (2) that the Court, in keeping with a modern trend in this direction, should overrule its prior holdings.

[1] In a recent opinion of this Court it was exhaustively settled that under the common law a wife had no cause of action for loss of consortium; and that, since this decisional law has not been changed by statute, the law of Tennessee remains that there can be no recovery by a wife for loss of consortium by reason of injury to her husband. See Rush v. Great American Insurance Co. (1964) 213 Tenn. 506, 376 S.W. 2d 454. It is our intention to fully adhere to the doctrine of that decision. It is true that decision dealt with the subject of negligent injury to the husband, rather than with intentional injury. It is to be noted, however, that one of the cases cited in the opinion was that of Smith v. United Construction Workers, District 50 (1960) 271 Ala. 42, 122 So. 2d 153. In that case, the wife sued for loss of consortium of her husband, whose injuries, resulting in the alleged loss to the wife, were sustained as a result of an assault and battery committed upon him by the defendants. That Court denied recovery, though the injury inflicted upon the husband was plainly the result of an intentional tort, just as is alleged in the declaration in the case now before this Court. As stated, we adhere to all the views expressed in Rush v. Great American Insurance Co., supra, and in light of this, nothing is to be gained by again re-examining the points there decided.

[168] As said, the plaintiff lays great stress upon the fact that the present declaration alleges in-

tentional wrong. The fact remains that this is a cause of action for damages for loss of consortium; and it is our view that the suggested distinction is one without a difference. It is not a predicate for liability which the plaintiff here lacks; it is want of a cause of action under Tennessee law for the damages which she seeks to recover.

[2] The plaintiff in this case seeks to analogize this case to those cases where a wife is allowed to recover damages for losses resulting from an alienation of affection or criminal conversation. We think the appropriate distinction between these cases and the case at bar is illustrated by the following quotation from 24 A.L.R. 2d 1378, at page 1382:

"II. Loss resulting from intentional or wilful acts of defendant.

Sec. 3. Right of action recognized; generally.

Most of the cases involving intentional acts of the defendant directed against the marital interests of the wife, are for alienation of affections or criminal conversation which are not covered in this annotation. There have been some instances, however, where the courts have recognized a right of action in the wife for slanderous statements made to the husband about her, and for injuries intentionally inflicted upon the husband, although it is generally held that the malicious intent must be directed against her or the marital relationship itself, rather than against her husband."

To quote further from the above annotation:

"In most of the cases in which the wife's claim has

been based on the assertion that the injuries resulting in the loss to her of her husband's consortium were intentionally and maliciously inflicted upon him recovery has been denied." 24 A.L.R. 2d at 1385.

Obviously the foregoing does not support a recovery in this case, where the intentional injury is directed, not at the wife or the marital relationship, but at the consumer of the drug; in this case, the husband.

[3] As to the second contention of the plaintiff, that this Court should overrule its previous decisions and allow the wife to recover for loss of consortium, we cannot agree: We stand by the proposition so ably stated in Ruth v. Great American Insurance Co., supra, that this argument is rightly directed to the Legislature. We hold with the reasons stated in that opinion for this conclusion.

[4] Argument is made that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires this Court to allow the wife recovery for loss of consortium, since the same is allowed a husband. To fail to do so, it is said, is to discriminate on the basis of sex; and that such is not a proper or legal basis for discrimination. In the first place, we do not find this question to be properly and timely made by the assignments of error in this case. Cf. Whitehurst v. Howell (1936) 20 Tenn. App. 314, 98 S.W. 2d 1071; Taylor v. Elgin (1918) 140 Tenn. 602, 205 S.W. 428. The idea here seems to have originated with a case from the United States District Court for the Western District of Michigan under the style of Owen v. Illinois Baking Corp., 235 F. Supp. 257. A second case of Clem v. Brown (Ohio Com. Pl. 1965) 207 N.E. 2d 398, is cited. We are in complete disagreement with

both the reasoning and result in those cases.

Assuming, but not deciding, that the Fourteenth Amendment to the United States Constitution would ever rightly come into play in a case such as that presented by this record, it is our view that many and obvious differences between what, by legal logic is re-
[169] coverable by the male spouse for injury, on the one hand, and the female spouse on the other, may be conceived of. In short, under this view, the Tennessee rules with respect to recovery for loss of consortium does not work a "discrimination" but no more than a practical and logical classification.

What we hold here is that the opinion in Rush v. Great American Insurance Co., supra, states the existing law of Tennessee; and, that under that law the plaintiff wife cannot maintain an action for loss of consortium by reason of injury to her husband, either on the basis of negligence or intentional act.

The judgment of the trial court, sustaining the demurrer of the defendant, is affirmed, with costs of this appeal assessed against the plaintiff below, appellant here.

BURNETT, C. J., and WHITE, DYER and CHATTIN, JJ., concur.

OPINION ON PETITION TO REHEAR

CRESON, Justice.

We have been presented with a petition to rehear. The essence of this petition seems to be that some phraseology contained in the Court's original opinion in this case has the effect of impeding or imperiling the appellant's further review of the question made with respect

to "discrimination" in violation of the Fourteenth Amendment to the United States Constitution.

We have, at some length, re-examined the original opinion, the petition to rehear and the reply thereto. On so doing, we think that the original opinion is entirely adequate as a basis for appellant's presentation of her contention to any other court. What we said in the original opinion, and say again, is that if the Fourteenth Amendment to the United States Constitution rightly comes into play in the situation presented in this case, then there is a permissible "classification," rather than an impermissible "discrimination." We are content to abide the Court's original opinion.

Petition to rehear is denied.

BURNETT, C.J., and WHITE, DYER and CHATTIN, JJ., concur.

Tennessee Supreme Court Order

SUPREME COURT, NASHVILLE

FRANCES D. KROHN

Vs.

RICHARDSON-MERRELL, INC.
THE WILLIAM S. MERRELL
COMPANY DIVISION

} Davidson Law
Affirmed

This cause coming on to be heard upon a transcript of the record from the Circuit Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be in all things affirmed and that the demurrer be sustained and the case dismissed.

The costs of the Court below and the cost of the appeal will be paid by Frances D. Krohn, Principal, and Globe Indemnity Insurance Company, Surety. 7/18/66.

Tennessee Supreme Court Order Denying Rehearing

SUPREME COURT, NASHVILLE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC., THE WILLIAM S. MERRELL COMPANY DIVISION

Davidson Law

Petition to Rehear Denied.

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of petitioner. 9/23/66

OFFICE OF THE CLERK FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE.

[fol. 1]

TO THE JUDGES OF THE CIRCUIT COURT
OF DAVIDSON COUNTY, TENNESSEE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC.
The WM. S. MERRELL COMPANY
DIVISION
a Delaware Corporation domesticated in Tennessee

NO. 72167

FIRST AMENDED DECLARATION

FIRST COUNT

With leave of the Court, plaintiff files this First Amended Declaration and sues defendant for $250,000.00 compensatory damages and for cause of action avers:

Plaintiff is an adult resident of Davidson County, Tennessee. Defendant is a corporation engaged in the manufacture and sale of drugs and medicines intended for human consumption.

On July 15, 1960, when her husband, Howard E. Krohn was 39 years old, he was suffering from elevated serum cholesterol, and on or about that date their family physician prescribed for him a drug named Triparanol, commonly referred to under the trade name of MER/29. This drug was developed, manufactured, advertised and sold by defendant which represented it to be a safe and

efficient drug for use by humans in cases of elevated serum cholesterol.

Her husband took MER/29 in the prescribed dosages as recommended by the defendant. Over a period of six months his cholesterol gradually reduced but [fol. 2] early in 1961 various unusual conditions and symptoms began to appear which she avers were adverse effects of his taking the drug MER/29. There was a gradual reduction in his libido and potency. His skin began itching. His hair suddenly began turning gray and falling out at an abnormal rate. He began having trouble with his eyes and vision which was growing worse and was the early stages of the formation of cataracts.

On March 20, 1961, on the advice of his physician he stopped taking MER/29. During the next several months the itching of his skin stopped, his hair stopped turning gray and falling out at the abnormal rate, his eye difficulty gradually cleared up, and his potency and libido began returning gradually. However, his potency and libido continued to increase beyond normal for a man his age and in the latter part of May and first part of June he and plaintiff were amazed to find him with the potency and libido he had had as a young man. This excessive increase continued increasing until June 20, 1961, on which date he sustained a priapism, that is to say, an erection which would not subside and which became extremely painful.

Their family physician promptly hospitalized plaintiff's husband in St. Thomas Hospital in Nashville and called a urologist into consultation in the case. During the next 17 days, that is, from June 20, 1961 until July 7, 1961, despite the most skillful treatment, her husband's

pain was so excruciating that the constant administration of morphine had very little effect, and his pain was so extreme and agonizing, it was necessary for him to be strapped to his bed in the hospital and at times it was necessary for the nurses to hold his mouth open to prevent him from chewing up his tongue in his [fol. 3] agony. This excruciating and agonizing pain rapidly brought on a bleeding gastro-intestinal ulcer, a condition from which plaintiff's husband had never suffered before, and from which he later recovered and has not suffered since.

About July 7, 1961 the priapism and agonizing and excruciating pain accompanying it, began to subside gradually but it was several months before they had disappeared. The massive doses of morphine administered to plaintiff's husband had caused him to become addicted to morphine and he suffered the tortures of withdrawal from the drug when its use was discontinued by the doctors. However those tortures were almost as nothing compared with the pain from his priapism between June 20 and July 7, 1961.

When her husband's priapism finally subsided he was left with a completely flaccid penis, which has remained flaccid ever since. Though her husband still has his libido or sexual desire, he is completely impotent and unable to perform the sexual act in the slightest. This has caused great physical and mental suffering to plaintiff and psychological difficulties affecting both her and her husband. Plaintiff is a normal, healthy woman who was then only 36 years of age, and she was and is in all respects a normal young woman for her years with normal emotional and sexual responses and needs. She avers that she had the expectancy of many years normal

consortium with her husband which has now been completely destroyed as she and her husband are advised by his physicians and she believes and avers that her husband's condition is permanent and that he will never again in the remainder of his life be able to
[fol. 4] perform the sex act.

Plaintiff avers that her husband's above described abnormal conditions and disorders culminating is his priapism and his complete impotency since July 7, 1961 are the direct and proximate result of his taking of the drug MER/29. Plaintiff avers that defendant was guilty of negligence in the development, advertising, warranty and sale of said drug in the following particulars, each and all of which proximately caused or contributed to the injury to and damage of plaintiff's husband:

(1) Defendant did not sufficiently and efficiently test this drug before putting it on the market for use by human beings.

(2) Defendant deliberately suppressed, withheld and misrepresented the adverse effects of this drug on test animals, including adverse sexual effects and abnormalities shown by the animals on which the drug was tested.

(3) Defendant wilfully withheld and misrepresented the foregoing information from and to the Food and Drug Administration with the result that the use of MER/29 was approved and licensed, the acts of defendant in this connection being a fraud in fact and a fraud in law.

[fol. 5] (4) Defendant by advertisements, by written brochures, by oral statements, by articles promoted by defendant and otherwise falsely repre-

sented to the Medical Profession, to pharmacists and to the general public that the drug MER/29 was a safe and efficient drug for the reduction of cholesterol in the blood and was free of harmful side effects, when in truth and in fact the said drug was unfit for and dangerous to humans and caused many harmful adverse effects, including those mentioned above which defendant knew or should have known. These false representations were relied upon by the doctors for plaintiff's husband and by her husband, to plaintiff's damage.

(5) Defendant failed to exercise reasonable and ordinary care in preparation, manufacture and distribution of this drug, and failed to give warning of its dangers.

(6) The defendant negligently failed to withdraw MER/29 from the market until an unreasonable period of time had passed after the defendants knew or should have known of its dangerous characteristics.

Plaintiff sues for her physical and mental pain and anguish and suffering and for the loss of consortium of her husband for the remainder of their natural lives.

Wherefore plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

[fol. 6] SECOND COUNT

Plaintiff adopts each and all of the averments of the First Count of this her Declaration as fully as though copied herein and for further cause of action avers:

That during the time here in question there was in full force and effect the following Statutes of Tennessee:

"47-1212. 'Express warranty' defined.—Any affir-

mation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." *47-1212, Tennessee Code Annotated.*

"47-1215. Implied warranties of quality or fitness.— Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not,) there is an implied warranty that the goods shall be fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

. . .

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this chapter, unless inconsistent therewith." *47-1215, Tennessee Code Annotated.*

First Amended Declaration

[fol. 7] At all times mentioned herein, the defendant, through its duly authorized agents, servants and employees, acting within the course and scope of their employment, was manufacturing, packaging, labelling, distributing and selling MER/29 for use by physicians in caring for their patients, and said defendant was representing, in its advertising, that MER/29 was effective in the control of excess body cholesterol by inhibition of its biosynthesis.

The defendant expressly warranted that MER/29 was virtually non-toxic and remarkably free from adverse effects, even on prolonged clinical use, and the defendant impliedly warranted that MER/29 was fit and proper for the purpose of treating such persons as the plaintiff's husband, and was of merchantable quality. These warranties were relied upon by the doctors for plaintiff's husband and by her husband, to plaintiff's damages.

At all times mentioned here, MER/29 was not non-toxic and did frequently produce adverse effects in humans, resulting in serious bodily harm and illness, and MER/29 was not of merchantable quality and was not fit and proper for the treatment of persons such as the plaintiff's husband.

Plaintiff avers that defendant violated the foregoing Statutes and breached both its Express and its Implied Warranties, which violations were proximate causes of her husband's pain, suffering and permanent disability as aforesaid.

[fol. 8] Plaintiff sues for her physical and mental pain and anguish and suffering and for the loss of consortium of her husband for the remainder of their natural lives.

Wherefore plaintiff sues defendant for $250,000.00 compensatory damages and demands a Jury to try her cause.

WATKINS, McGUGIN & STEWART

BY /s/ Dan E. McGugin
Attorneys for Plaintiff

I certify that copy of the foregoing Declaration has been sent to Mr. John K. Maddin, Jr., of counsel for defendant this 5th day of August, 1965.

/s/ Dan E. McGugin

[fol. 1]

In The
CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC.
The WM. S. MERRELL COMPANY
DIVISION

NO. 72167

SUPPLEMENT TO FIRST AMENDED DECLARATION

With leave of the Court plaintiff amends and supplements her First Amended Declaration by adding the following words and figures:

THIRD COUNT

Plaintiff adopts all of the averments of the First Count as fully as though copied herein and for further cause of action avers:

That defendant violated its common law implied warranty that the medicine MER/29 was fit for the purpose for which it was manufactured, advertised and sold, to wit, human consumption when in fact it was not, being dangerous and injurious to human health, and/or unfit for human consumption, to the injury of plaintiff's husband.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

Supplement to First Amended Declaration

[fol. 2] FOURTH COUNT

Plaintiff adopts all of the averments of the First Count as fully as though copied herein and for further cause of action avers:

Plaintiff avers that the defendant was engaged in the business of manufacturing and selling the product MER/29 for use as a medicine by human beings; that defendant expected the said medicine to reach the user or consumer without substantial change in the condition in which it was sold; that the medicine MER/29 did reach plaintiff's husband and was consumed by him without change in the condition in which it was manufactured and sold; that the said medicine MER/29 as manufactured was defective and unreasonably dangerous to users and consumers; that the said medicine because of its unreasonable and inherently dangerous characteristics permanently injured and damaged plaintiff's husband as aforesaid, for which defendant is under a strict liability under and by virtue of the Doctrine of Strict Liability as applied by the law of Tennessee.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

FIFTH COUNT

Plaintiff adopts all of the averments of the First Count as fully as though copied herein and for further cause of action avers:

That defendant was engaged in the business of manufacturing and selling the drug MER/29 and by
[fol. 3] advertising, labeling and otherwise made to the public a misrepresentation of a material fact concerning the character or quality of said drug

sold by it, to wit, that it was a proper drug for human consumption and that it was free or reasonably free from harmful side effects which was relied on by plaintiff's husband, this being false as the said drug was in fact dangerous and unfit for human consumption and caused serious and permanent adverse or side effects to plaintiff's husband's damage and the permanent impairment of her husband's health as aforesaid, on account of which the defendant is under a strict liability under and by virtue of the Doctrine of Strict Liability as applied by the law of Tennessee.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

SIXTH COUNT

Plaintiff adopts all of the averments as fully as though copied herein and for further cause of action avers that:

That the drug MER/29 was researched, manufactured, bottled in sealed containers, advertised and sold by the defendant; that it was unopened and unchanged in any way when purchased and taken by plaintiff's husband as directed to plaintiff's husband's injury and damage as aforesaid; and that the same was in the control of defendant within the meaning of the doctrine of res ipsa loquitur as applied under the law of Tennessee.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

WATKINS, McGUGIN & STEWART

BY /s/ Dan E. McGugin
Attorneys for Plaintiff

In The
CIRCUIT COURT OF DAVIDSON COUNTY,
TENNESSEE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC.,
ETC.

NO. 72167

DEMURRER

[Filed September 24, 1965]

Comes now the defendant, through its attorneys, and demurs to the declaration heretofore filed in this cause upon the ground that there is no warrant in law for the maintenance of such action as the plaintiff seeks, because she could not maintain such a suit at common law and there is no statute in Tennessee permitting its maintenance.

WHEREFORE DEFENDANT PRAYS JUDGMENT UPON ITS DEMURRER.

GRACEY, BUCK, MADDIN & COWAN

BY: /s/ John K. Maddin, Jr.
Attorneys for Defendant

I certify that a copy of this Pleading has been forwarded to Counsel of Record in this cause. This the 23 day of Sept., 1965.

GRACEY, BUCK, MADDIN & COWAN

BY: /s/ J. K. Maddin, Jr.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in sustaining the demurrer to the Declaration. Tr. p. 21.

2. The Trial Court erred in finding and ruling that there is no such cause of action in Tennessee *under these particular facts* and as result in dismissing Appellant's suit. Tr. p. 31.

[fol. 1]

In The
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IRENE OWEN,
Plaintiff,

V.

ILLINOIS BAKING CORPORATION,
an Illinois corporation,
Defendant.

CIVIL ACTION
NO. 4619

OPINION

After a trial by jury, a judgment of $30,000 was returned in favor of plaintiff's husband in companion case 4618, for injuries received in an automobile collision between cars driven by plaintiff's husband and an employee

of defendant. In the instant case, a judgment of $5,000 was returned in favor of plaintiff for loss of consortium as a result of the accident.

Defendant has moved the court to set aside the judgment in case 4619, and seeks a new trial in case 4618.

The basis on which the court is requested to set aside the judgment of $5,000 is that under the decided cases in Indiana, which was the situs of the accident, there is no right of a wife to recover damages for loss of consortium, although such right is recognized as to a husband Burk v. Anderson, 232 Ind. 77, 109 N.E. 2d 407 (1953). The opinion in that case expressed marked dissatisfaction with the rule, but felt that under the decided precedents, no other decision was possible.

[fol. 2] In the opinion of this court, following the reasoning of the United States Court of Appeals for the District of Columbia Circuit, modern concepts of the marital relationship do not allow such anachronistic practices to be perpetuated in the law. In the case of Hitaffer v. Argonne Co., 183 F. 2d 811, cert. den. 340 U.S. 852, 71 S. Ct. 80, 95 L. Ed. 624, the court held that a husband and wife have, in the marriage relation, equal rights which will receive equal protection of the law. In the subsequent case of Smither & Co. v. Coles, 242 F. 2d 220, cert. den. 354 U.S. 914, 77 S. Ct. 1299, 1 L. Ed. 2d 1129, the District of Columbia Circuit overruled the decision in the Hitaffer case inasmuch as it related to the scope of exclusive liability provisions in the District of Columbia Workmen's Compnesation Act. However, it recognized the holding in that case that a wife has a protected right to maintain an action for loss of consortium.

As pointed out by the Hitaffer court, the right existed at common law, and when female emancipation resulted in the passage of enabling legislation removing previous disabilities on a woman's right to act in her own behalf before the law, the last barrier to the maintenance of such a suit should have been removed. (Id. at 816.)

In Indiana, two theories have been advanced to support the existing rule. In Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912), the court held that this interest of the wife was not a property right or derived from a contract of bargain and sale, and it lies in an area which the law will not enter except out of necessity. However, the right is characterized, it arises from the marital relation, and to say that it inheres in the husband but not the wife is to indulge in what the Hitaffer court termed "legal gymnastics." And to grant a husband the right to sue on this right while denying the wife access to the courts in the assertion of this same right is too clearly a violation of Fourteenth Amendment [fol. 3] equal protection guarantees to require citation of authority.

In Doden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860, the court concluded that all actions for loss of consortium were in fact actions for loss of services, and stated that it was unaware of any case which had been maintained solely for loss of consortium. This rationale is effectively refuted by the more recent Indiana case of Burk v. Anderson, supra, which recognized explicitly that services are only one element of the right which the law designates as consortium, and stated that the husband has a right of action for loss of all the elements of consortium, and not merely services, as intimated by the court in Boden, supra.

Thus again, to say that the husband has a right of action for all the elements of his consortium, but the wife does not, runs afoul of Fourteenth Amendment guarantees.

Under the Erie doctrine, federal courts are bound to follow the substantive law of the states in diversity cases. However, when, as here, a federal question is presented, the court does not look to the law of the state, but to federal law as interpreted by the United States Supreme Court, Porter Royalty Pool Co. v. C.I.R., 165 F. 2d 933, (CCA 6, 1948), cert. den. 334 U.S. 833, 68 S. Ct. 1347, 92 L. Ed. 1760 (1948).

Thus, this court determines that the denial of the right to sue for loss of consortium, when applied to a wife but not a husband, is clearly a violation of the wife's right to equal protection of the laws under the Fourteenth Amendment to the Federal Constitution. To draw such a distinction between a husband and
[fol. 4] wife is a classification which is unreasonable and impermissible, and likewise a violation of the Fourteenth Amendment guarantees.

The motion to set aside the judgment in favor of Irene Owen in Civil Action 4619 is hereby denied. An order may be drawn accordingly.

Dated: February 7, 1966.

/s/ Noel P. Fox
District Judge